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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 773

UNITED STATES OF AMERICA for the use and benefit of
J. A. EDWARDS & CO., INC.,

Petitioner,

against

PETER REISS CONSTRUCTION CO., INC., and
THE TRAVELERS INDEMNITY COMPANY,

Respondents,

and

BEN B. GREENE, INC.,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, J. A. Edwards & Co., Inc. (use plaintiff and appellant below), respectfully prays that a writ of certiorari issue to review the judgment (Appendix A) of the United States Court of Appeals for the Second Circuit, affirming the judgment of the District Court of the United States for the Eastern District of New York (Bruchhausen, D. J.).

Opinions Below

The opinion of the District Court is reported in 174 F. Supp. 264 (25a-28a).* The opinion of the Court of Appeals is not yet reported and is hereto annexed (Appendix B).

Jurisdiction

The judgment of the Court of Appeals was dated and entered December 16, 1959.

The jurisdiction of this Court is invoked under 28 U.S.C., §1254.

Questions Presented

1. Whether in a Miller Act suit on a surety's bond (40 U.S.C., §270b[a]), a distinction exists in favor of a subcontractor's materialman on a Government project making periodic deliveries to said project under a single contract, and a materialman making such deliveries under a series of separate, independent orders issued by said subcontractor?

2. Whether a lapse, in excess of four (4) months, between the last delivery and the one preceding it, invalidates a Miller Act claim of an unpaid materialman on a Government project, who made deliveries thereto under separate orders over a 6½ month period and who gave notice of its claim, sufficient in form, to the prime Government contractor, within ninety (90) days of the last delivery?

3. Whether the letters dated January 9, 1957 (Pl. Ex. 13; 35a), January 21, 1957 (Pl. Ex. 14; R. 31; Pl's. Reply Brief, p. 9) and April 5, 1957 (Pl. Ex. 12; 7a), when read together, constituted sufficient written notice under the Miller Act so as to entitle petitioner, as an unpaid materialman, to recover the value of material concededly delivered to the Government project here involved?

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* The letter "R" signifies references to the District Court record; the letter "a", references to the Court of Appeals appendices.

Statute Involved

49 Stat. 794 (1935), Title 40, U.S.C., §270b. "Same; right of persons furnishing labor or material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit."

Statement of Case and Disposition Below

This case presents for the Court's consideration a judicial construction of the Miller Act (40 U.S.C., §270b) against the following fact pattern and the dispositions made below:

The petitioner, a wholesale distributor of electrical material with offices in New York City, commenced this action upon a Miller Act surety bond on J[redacted]1957, in the United States District Court, Eastern D[redacted]rict of New York, to recover a balance of $6,274.44 for electrical material concededly delivered at the instance of a subcontractor, to a United States Government Nike site, located at Lido Beach, Long Island, New York, and known as "Special AAA Facilities, Lido Beach, N. Y.". There were named as defendants in this action: (1) Ben B. Greene, Inc. (hereafter referred to as "Greene"), a subcontractor with whom petitioner had a direct contractual relationship; (2) Peter Reiss Construction Co., Inc. (hereafter referred to as "Reiss"), who was the prime Government contractor and the principal named in the bond, and (3) The Travelers Indemnity Company (hereafter referred to as "Surety"), the surety on said Miller Act bond.

The petitioner's complaint in the District Court sought judgment, in contract, against the defendant-subcontractor and on the Miller Act surety bond, as against the respondents', Reiss and the Surety. The defendant-subcontractor defaulted and judgment was thereupon duly entered against it in the sum of $7,232.93, which included interest (R. 414-417).

The answer of the respondents Reiss and the Surety contained no separate or special defenses.

The case was tried to District Judge Bruchhausen on December 8, 9 and 10, 1958, without a jury. Petitioner's complaint was dismissed after trial, upon the sole ground that

petitioner failed to prove the delivery, under the prime contract, on March 5, 1957, of a safety switch valued at $15.90 (27a), therefore invalidating, as untimely, petitioner's 90-day Miller Act notice of April 5, 1957, found to have been served in proper form, upon the prime contractor (Appendix B; p. 20). The Court of Appeals affirmed the judgment upon grounds neither urged nor discussed by the District Judge (Appendix B; p. 21). The District Judge specifically stated that judgment would have been awarded to the petitioner if such delivery had been proven (27a), yet Finding No. 18 (25a) by the District Judge conclusively established such delivery, i.e., the District Judge obviously erred seriously. Thus, the case came to the Court of Appeals, without visible support for the District Court judgment.

On November 17, 1955, respondent Reiss, as general contractor, entered into a prime contract with the United States Government for the general construction of the aforesaid Nike site, at a contract price of $844,037.00 (Pl. Ex. 1; R. 22). Pursuant to the Miller Act, the respondents Reiss and the Surety executed their payment bond "conditioned that if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work, provided in said contract, and any and all duly authorized modifications of contract that might thereafter be made, then the obligation be void; otherwise to remain in full force and effect" (Pl. Ex. 1; R. 22).

On December 8, 1955, the respondent Reiss, as prime contractor, entered into a written subcontract with the defendant Greene in the sum of $76,000.00, calling for the performance by Greene of the electrical work and the furnishing of electrical material under the prime contract (Pl. Ex. 2; R. 13).

The subcontractor Greene, by a series of orders, ordered from the petitioner the aforesaid electrical material. The

petitioner, in turn, caused the said material to be delivered to the job, on the dates and in the amounts, hereinafter set forth (R. 59-78; Appendix B, p. 19; 32a-33a).

Exhibit No.	Date 1956	Invoice No.	Amount
3	Aug. 24	6824	$8,109.53
4	Sept. 25	7181	1,676.00
5	Oct. 8	7338	31.24
6	" 15	7403	34.40
7	" 19	7475	686.00
8	" 24	7522	224.20
9	" 31	7592	89.00
	1957		
10	Mar. 5	9278	15.90
	Total amount shipped		$10,766.27
	Credit: Mar. 1, 1957		4,491.83
	Balance due and in suit		$ 6,274.44

The last delivery involved in this action, made on March 5, 1957, consisted of the safety switch. Thereafter the petitioner made three separate deliveries, aggregating $204.81 (evidence of 3 deliveries excluded, R. 27; 143).

On January 9, 1957, the subcontractor Greene wrote the prime contractor Reiss, requesting that moneys due Greene, from Reiss, be paid to the petitioner, J. A. Edwards & Co., Inc., and that said payments be charged to Greene under the subcontract (Pl. Ex. 13; R. 35a). Greene claimed a balance then due of $11,241.42, referable to the Government project here involved. Greene at that time owed petitioner for materials delivered to this particular project the sum of $10,750.37 (Pl. Exs. 5-9, incl.; R. 24-26).

On January 21, 1957, respondent Reiss wrote Greene requesting, from Greene, proof of petitioner's delivery of material to the job (Pl. Ex. 14; R. 31; Pl. Reply Brief, p. 9). (Greene, by affidavit, sworn to February 21, 1957, showed a balance then due petitioner of $10,750.37. This affidavit was excluded by the District Judge [R. 203-4; 239-40; 254-5; 279-81 and 32-3].)

On January 31, 1957, Greene wrote to Reiss enclosing invoices covering petitioner's deliveries of material to the job, showing a sum due petitioner of $10,919.13 as of that date and demanding payment of the sum of $11,241.42 previously claimed under the January 9th letter (Letter excluded, R. 33).

On February 26, 1957, Reiss issued its check to Greene in the sum of $4,491.83. Greene, in turn, endorsed the said check over to petitioner (Deft. Ex. F; R. 249—Check #1139). This payment was credited to Greene's account with petitioner on the job here involved (Appendix B, p. 19, infra).

On April 5, 1957, the petitioner, as an unpaid materialman, sent the Miller Act 90-day written notice to Reiss and the Surety, certified mail. Its receipt was duly acknowledged by the respondents (7a; 9a). The District Judge and the Court of Appeals held that this notice was proper in form (27a; Appendix B, infra, p. 20).

There was a lapse of more than four (4) months between the safety switch delivery on March 5, 1957, and the delivery immediately preceding it, made on October 31, 1956. The District Judge's opinion dismissing petitioner's complaint, so far as here material, states (27a):

"* * *

"A subcontractor, such as the plaintiff, may not recover under the Miller Act unless it delivers materials or performs labor, called for by the terms of the prime

contract, and also serves the notice within ninety days after the date of such delivery or performance. See United States, for Use of Bourquin v. Chester Construction Co., 104 F. 2d 648; United States, for Use of General Electric Supply Corp. v. Hershon Co., 52 F. Supp. 832. Hence, the plaintiff was obligated to prove that it caused a delivery of material, called for by the terms of the prime contract, to be made to Greene within the period of ninety days preceding the date of service of the notice.

"Concededly, a delivery of such material was made on October 31, 1956. If that date was the last time such contract material was delivered then the notice of April 5, 1957 was too late and not within the ninety days' period.

"The plaintiff claims a later delivery, the delivery of a switch costing $15.90, on March 5, 1957. This claim is the principal issue in the case. If sustained, the notice of April 5, 1957 would have been timely, as within the ninety days' provision.

"The plaintiff's proof is most unsatisfactory and unconvincing. It makes a desperate and futile effort to tie in this minor item with the prime contract. * * *"

The proof was overwhelming that the $15.90 safety switch was in fact delivered on March 5, 1957, and that it was tied in with the prime Government contract. (See Finding No. 18 (25a) and respondents' concession in the Court of Appeals.)

Finding.

Finding No. 18. "That by separate purchase order numbered 2311 dated February 20, 1957 Ben B. Greene, Inc. ordered a Safety Switch SU-221 from plaintiff, for which Ben B. Greene, Inc. agreed to pay plaintiff the sum of $15.90, which safety switch was delivered to Ben B. Greene, Inc., at the 'Nike Project' on or about March 5, 1957."

Concession (Respondents' Brief—Court of Appeals, p. 4)*.

> "* * * The fact is that there never was any question about the delivery of the switch in question nor that it was used in connection with the prime contract. That was expressly found by the Court on the appellee's request, being Finding of Fact No. 18. * * *"

Subsequent to the dismissal of petitioner's complaint in the District Court, District Judge Zavatt, in the same Court, in another case, found judgment for petitioner involving the same subcontractor Greene, the same attorneys, and the same legal principles (*U. S. A.* for use and benefit of *J. A. Edwards & Co., Inc. v. Bregman Construction Corp.* (E.D., N.Y.), 172 F. Supp. 517, April 23, 1959). The *Bregman* judgment was paid in full and not appealed.

On March 13, 1959, District Judge Watkins, sitting in the District Court for the District of Maryland, decided the case of *U. S. A.* to the use of *Noland Company* v. *Allied Contractors*, 171 F. Supp. 569. In that case, a materialman's Miller Act claim, based upon several independent orders and not upon an entire contract, was dismissed by reason of the materialman's failure to give separate 90-day notices after each delivery.

The decision in *Noland* was diametrically opposite to the decision by District Judge Zavatt in *Bregman*.

On petitioner's appeal to the Court of Appeals, the respondents below leaned heavily upon the District Court opinion in the *Noland* case, which was then on appeal to the

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* The opinion of the Court of Appeals assumed, without specifically discussing the point, that delivery of the switch had been made pursuant to the requirements of the prime Government contract (Appendix B pp. 19, 21).

Court of Appeals, Fourth Circuit (Appendix B, pp. 20-21). Respondents argued that *Noland* was "directly in point" (Respondents' Brief, p. 12). *Noland* was reversed on December 24, 1959, i.e., subsequent to the decision below by the Court of Appeals on December 16, 1959. The Fourth Circuit cited and quoted *Breyman* (Zavatt, D. J., supra), as a sustaining authority (—— F. 2d ——).

With the reversal of *Noland* by the Court of Appeals, Fourth Circuit, respondents' main judicial prop disappeared. The Court of Appeals below recognized that the District Court opinions in *Breyman* and *Noland* represented mutually antagonistic judicial views (Appendix B, p. 20).

Reasons for Granting the Writ

1. The decision of the Court of Appeals below, in the instant case, is in direct and irreconcilable conflict with the later decision of the Court of Appeals, Fourth Circuit, in the case of *U. S.* to the use of *Noland Company* v. *Allied Contractors*, —— F. 2d —— (decided 12/24/59, rev'g 171 F. Supp. 569 [D. Md., March 13, 1959]). This conflict, on an important Federal question, should be finally and authoritatively settled by the Supreme Court.

The decision below holds that a Miller Act notice, given within 90 days of the last delivery to a Government project, is insufficient to impose liability for all deliveries to said project, where more than 90 days elapses between the last delivery and the preceding delivery, such deliveries having been made under separate, independent orders, issued by the subcontractor to the materialman. This decision necessarily and irresistibly leads to the conclusion, as argued successfully below by the respondents (Respondents' Brief, Court of Appeals, p. 24), that a materialman of a subcontractor must, perforce, serve separate 90-day notices, in such cases, after each delivery, to preserve his cause of action on the statutory

bond under the Miller Act. Judge Soper, writing in the *Noland* case (supra), said:

> "Moreover, the Miller Act lends itself to the alternate construction that if all the goods in a series of deliveries by the materialman to a subcontractor are used on the same government project the notice is in time as to all of the deliveries if it is given within 90 days from the last delivery."

The holding below is also in apparent conflict with the following cases, in each of which a single Miller Act notice was given within 90 days of the last delivery, even though said deliveries were made under separate, independent orders: *Apache Powder Co.* v. *Ashton Co., Inc.*, 264 F. 2d 417 (9th Cir., 1959); *Bruce Construction Corp.* v. *U. S.* for use of *Westinghouse Electric Supply Co.*, 242 F. 2d 873 (5th Cir., 1957); *Fourt* v. *U. S.* for use of *Westinghouse Electric Supply Co.*, 235 F. 2d 433 (1st Circuit, 1956); *Moyer* v. *U. S.* for use of *Trane Co.*, 206 F. 2d 57 (4th Cir., 1953); *Glassell-Taylor Co.* v. *Magnolia Petroleum Co.*, 153 F. 2d 527 (5th Cir., 1946).

It is apparent, therefore, that the principle enunciated by the Court of Appeals below is in direct conflict with relevant, existing case law, construing the Miller Act.

2. The decision below, contrary to the obvious Congressional intent, creates an artificial distinction between a materialman making deliveries to a Government project under separate orders, at the instance of a subcontractor, and a materialman making such deliveries under a single, overall contract. The Court of Appeals, in stressing this artificial, non-existent distinction, said (Appendix B, p. 19):

> "The principal question on this appeal concerns the date when the Miller Act, 40 U.S.C. § 270b(a), requires notice to be given to a contractor by a materialman who has furnished supplies to a subcontractor pursuant to a series of orders as distinguished from an overall contract."

There is little practical difference between the facts at bar and the facts in *U. S.* for the use and benefit of *P. A. Bourquin & Co., Inc.* v. *Chester Construction Co., Inc.*, 104 F. 2d 648 (2nd Cir., 1939), affirming a plaintiff's judgment where a hiatus existed in the delivery dates, and the last item of work performed amounted to $14.50, out of a total claim of $875.00. The Court of Appeals below, in effect, did not follow its own decision in *Bourquin*.

The Court below attempted to distinguish *Bourquin* from the case at bar, upon the ground that *Bourquin* involved a single contract and not separate orders—a distinction which finds no comfort or support in the language of the Miller Act.

That this apparent distinction violates the spirit and intent of the Miller Act is evident from a cursory reading of the statute and the opinion of reversal in the *Noland* case (supra), which, so far as material holds, quoting *Bregman*:

> "• • • The 90 day period is not stated to be measured from the date of the last delivery of material under an entire contract or on a running account or under each separate order. The Miller Act contemplates one such notice within 90 days from the furnishing of the last material furnished in the prosecution of the prime contract from which claim is made. If the material is so furnished pursuant to one entire contract, obviously the measuring date will be the date when the last material is so furnished. If the material is furnished pursuant to a series of separate contracts, the measuring date will be the date when the last material is furnished under the last contract. This is the internal sense of the Miller Act. It should be construed sensibly and its plain purposes should not be defeated by a narrow interpretation."

Apparently to the same effect: *Cooley* v. *Barten & Wood, Inc.*, 249 F. 2d 912 (1st Cir., 1957).

Significantly, the Court below cited no sustaining authorities in support of its views. Indeed, it expressly refrained from quoting any Miller Act language to support its decision. This is rather unusual, in a judicial opinion construing a statute.

The Miller Act was derived from State lien statutes. It was designed to afford substantially similar protection to those furnishing labor and material on Government projects: *U. S.* v. *Munsey Trust Co.*, 332 U. S. 234; *U. S.* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452; *U. S.* for use of *Gibson* v. *Harman*, 192 F. 2d 999 (4th Cir., 1951).

The main question involved on this petition, namely, the apparent distinction between deliveries under a single contract and under several, independent orders, has been the subject of judicial analysis in state decisions construing lien statutes similar in purpose and scope to the Miller Act. These decisions uniformly reject the reasoning of the Court of Appeals at bar and support petitioner's contentions: *Sandusky Grain Co.* v. *Borden's Condensed Milk Co.*, 214 Mich. 306, 183 N.W. 218 (Mich. Statutes Annotated, §26.285); *Union Trust Co.* v. *Casserly*, 127 Mich. 183, 86 N.W. 545; *American Bridge Co. of New York* v. *Honstain*, 120 Minn. 329, 139 N.W. 619 (Minn. Statutes Annotated, §514.08); *Milliken Bros.* v. *City of New York*, 201 N.Y. 65 (§10, Lien Law, Consol. Laws of N. Y.); *Chambers* v. *George Vassar's Sons & Co., Inc.*, 81 Misc. 562, 143 N.Y.S. 615; *Downingtown Mfg. Co.* v. *Franklin Paper Mills*, 63 N.J.L. 32, 42 Atl. 765 (N.J. Statutes Annotated, 2A:44-91).

3. The decision below seriously and adversely jeopardizes claimants' rights under the Miller Act, at the same time practically frustrating the effect of the recent Amendment to the Statute, enacted August 4, 1959 (Public Law, 86-135, 86th Congress, H. R. 4060). Under this Amendment, the one-year period of time, within which a Miller Act claimant may

commence action on the statutory bond, is no longer computed from the "date of final settlement of such contract", but rather "after the expiration of one year after the date on which the last of the labor was performed or material was supplied by him". The Statute was amended, so as to permit materialmen, etc., to determine from their own records, as distinguished from the Comptroller General's records, when the statute of limitations commences (Senate Report No. 551, July 21, 1959 [1st Session—86th Congress]).

Since the decision below virtually compels unpaid materialmen to serve separate statutory 90-day notices after each delivery, if the deliveries are made pursuant to separate, independent orders, the dilemma created by the decision of the Court of Appeals below is of serious proportions. The Statute provides (40 U.S.C.A. 270b[a]):

> "* * * Provided, however, That any person having direct contractual relationship with a subcontractor * * * shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, * * *."

There is no suggestion in the Statute that a materialman holding a single, overall contract for the delivery of materials to a Government project enjoys some special distinction or preference over a materialman making deliveries under several, independent orders to the same job.

The decision below considerably undercuts the purpose of the Amendment and injects chaos into an otherwise, clear statute. This is so, because the measuring date (both for service of 90-day notice and commencement of suit) is now completely shrouded in mystery. How does one define an independent order as distinguished from an overall contract? The decision below, because of the requirement of separate

notices, after each delivery, suggests a plethora of lawsuits affecting the same Government job and the same parties. Judge Zavatt, in *Breyman* (supra), stated that the construction of the statute "urged by the defendants would lead to absurd results" (furnishing examples). The rationale of the decision below is contrary to the pointed and specific rulings of the Supreme Court construing, in liberal fashion, the remedial Miller Act. The Act was designed primarily to assist materialmen, mechanics and laborers on Government projects, to recover the amount of their unpaid claims: *U. S.* for the benefit of *Sherman* v. *Carter*, 353 U.S. 210; *Clifford F. MacEvoy Co.* v. *U. S.* for use and benefit of *Calvin Tomkins Co.*, 323 U.S. 102.

4. The Court of Appeals below further erred seriously in disregarding the letters of January 9 and January 21, 1957 (Pl. Exs. 13 and 14), passing between the defendant-subcontractor and the respondent-general contractor, Reiss. These letters, admittedly sent and received within ninety days of the delivery of petitioner's material (other than the $15.90 safety switch on March 5, 1957), established requisite notice to the general contractor under the Miller Act within the meaning of the relevant case law construing said Statute: *Fleisher Eng. & Const. Co.* v. *U. S.* for the use and benefit of *Hallenbeck*, 311 U.S. 15 (1940); *Houston Fire & Cas. Ins. Co.* v. *U. S.* for use and benefit of *Trane Co.*, 217 Fed. 2d 727 (5th Cir., 1954); *Coffee* v. *U. S.* for the use and benefit of *Gordon*, 157 F. 2d 968 (5th Cir., 1946); *U. S.* for use of *Birmingham Slag Co.* v. *Perry*, 115 F. 2d 724 (5th Cir., 1940); *U. S.* for use and benefit of *Hopper Bros. Quarries* v. *Peerless Casualty Company*, 255 F. 2d 137 (8th Cir., 1958), cert. den. 358 U.S. 831; *McWaters and Bartlett* v. *U. S.* for the use and benefit of *Wilson*, 272 F. 2d 291 (10th Cir., 1959).

In *Houston*, the Court of Appeals said (p. 730):

> "It is not necessary that the writing relied on be signed by the supplier, it is sufficient that there exists a writing from which, in connection with oral testi-

mony, it plainly appears that the nature and state of the indebtedness was brought home to the general contractor. When this appears the object of the statute, to assure that the contractor will have notice, is attained and the statute is sufficiently complied with."

5. The narrow, restrictive interpretation of the Miller Act by the Court of Appeals below is inconsistent with, and does not take cognizance of, practices in the construction industry. The decision below fails to take into account that a substantial portion of material delivered to Government, as well as to private, construction jobs, is so delivered, pursuant to separate, independent orders, as distinguished from single, over-all contracts. That the questions here involved are important is evident from the fact that Governmental construction for each of the full years of 1957 and 1958 exceeded Three Billion Dollars (Construction Review, Feb. 1959 Issue, Vol. No. 5, No. 2, U. S. Department of Labor and U. S. Department of Commerce). Legitimate unpaid Miller Act claimants should be aided and not hindered in their attempts to enforce collection. This equates with the Congressional intent in the enactment of the statute:

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment of the Court of Appeals in this case.

Dated: March 30, 1960.

Respectfully submitted,

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APPENDIX A

Judgment Below

UNITED STATES COURT OF APPEALS
FOT THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and fifty-nine.

Present:

Hon. Harold R. Medina,
Hon. Leonard P. Moore,
Hon. Henry J. Friendly, *Circuit Judges.*

United States of America for the use and benefit of
J. A. Edwards & Co., Inc.,
Plaintiff-Appellant,

against

Peter Reiss Construction Co., Inc., and
The Travelers Indemnity Company,
Defendants-Appellees,

and

Ben B. Greene, Inc.,
Defendant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, with costs to the appellees.

A. DANIEL FUSARO,
Clerk.

APPENDIX B

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 73—October Term, 1959.

(Argued November 20, 1959 Decided December 16, 1959.)
Docket No. 25668.

UNITED STATES OF AMERICA for the use and benefit of
J. A. EDWARDS & CO., INC.,
Plaintiff-Appellant,

against

PETER REISS CONSTRUCTION CO., INC., and
THE TRAVELERS INDEMNITY COMPANY,
Defendants-Appellees,

and

BEN B. GREENE, INC.,
Defendant.

Before:

MEDINA, MOORE and FRIENDLY, *Circuit Judges.*

Appeal from a judgment of the District Court for the Eastern District of New York, Walter Bruchhausen, Judge, 174 F. Supp. 264, dismissing an action by use plaintiff under the Miller Act to recover for material furnished to a government project, against the contractor and its surety. Affirmed.

IRVING LEVINE, New York, New York, for Plaintiff-Appellant.

DAVID MORGULAS, New York, New York (M. Carl Levine, Morgulas & Foreman, New York, New York, on the brief), for Defendants-Appellees.

FRIENDLY, *Circuit Judge*:

The principal question on this appeal concerns the date when the Miller Act, 40 U.S.C. § 270b(a), requires notice to be given to a contractor by a materialman who has furnished supplies to a subcontractor pursuant to a series of orders as distinguished from an over-all contract. Judge Bruchhausen, in a reasoned opinion, held the notice was given too late. We agree.

The use plaintiff here is the same as in United States for the use of J. A. Edwards & Company v. The Thompson Construction Corp., decided this day. The subcontractor likewise is the same, Ben B. Greene, Inc. The prime contractor and the contract are different. The contract was for a Nike site at Lido Beach, N. Y. Reiss was the prime contractor and it, as principal, and the Travelers Indemnity Company, as surety, executed the Miller Act payment bond. Reiss employed Greene as electrical subcontractor and Greene in turn ordered various electrical supplies from Edwards.

Plaintiff's brief summarizes plaintiff's claim for material furnished the project as indicated in the margin.[1] The brief

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[1]

Exhibit No.	Date 1956	Invoice No.	Amount
3	Aug. 24	6824	$8,109.53
4	Sept. 25	7181	1,576.00
5	Oct. 8	7338	31.24
6	" 15	7403	34.40
7	" 19	7475	686.00
8	" 24	7522	224.20
9	" 31	7592	89.00
	1957		
10	Mar. 5	9278	15.90
	Total amount shipped		$10,766.27
	Credit: Mar. 1, 1957		4,491.83
	Balance due and in suit		$ 6,274.44

states that the dates given are billing dates but that these coincide substantially with the delivery dates. Edwards did not have to furnish any specified portion of the electrical supplies; deliveries were made pursuant to individual purchase orders. As Edwards' vice-president testified, "We received orders, not an order."

On April 5, 1957 Edwards served a notice on Reiss by certified mail. The notice asserted a claim in the amount of $6,274.44 against Greene for electrical supplies furnished Greene at various times from on or about August 24, 1956 to March 5, 1957, for use in Greene's performance of contract obligations to Reiss for electrical work on the Lido Beach facility.

There is no question that the April 5, 1957 letter was proper in tenor. The question is whether it was proper in time. Edwards asserts that since the notice was served within 90 days of the March 5, 1957 delivery of a $15.90 switch, it was "within 90 days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made" and that it relates back to include all the earlier deliveries. Reiss and its surety, of course, deny this.

Judge Bruchhausen properly held Edwards' contention untenable. We are not here required to decide whether, when a materialman makes deliveries under a series of purchase orders so that each delivery is within 90 days of its predecessor, a notice given within 90 days of the last order or delivery will relate back to include the entire chain. Judge Zavatt so ruled in United States for the use of Edwards v. Bregman Construction Corp., 172 F. Supp. 517 (E.D.N.Y. 1959) but Judge Watkins held the contrary in United States to the use of Noland Co. v. Allied Contractors, 171 F. Supp. 569 (D. Md. 1959), which we are advised is now under appeal to the

Fourth Circuit. The question here is an easier one. In this case any rights of Edwards to make claim against Reiss and the surety with respect to the deliveries of August, September and October, 1956, ended on January 29, 1957. From that day forward Reiss could have made payments to Greene free from any liability to Edwards under the Miller Act with respect to all these deliveries. Even if the more liberal view were to be taken in cases such as those decided by Judge Zavatt and Judge Watkins, and we by no means intimate that we would do so, it would be wholly inconsistent with the purpose of the notice provision of the Miller Act, as explained in our opinion in the Thompson case, to hold that a shipment made on March 5, 1957, under an order of February 20, 1957, could revive a Miller Act liability long extinguished and thereby place in jeopardy payments properly made by the contractor to the subcontractor in the interval. Our decision in United States for the use of Borquin v. Chester Construction Co., 104 F. 2d 648 (2d Cir. 1939), in no way supports the plaintiff since that case concerned work done under a contract and not under a series of purchase orders.

In the District Court, Edwards relied also on a letter from Greene to Reiss dated January 9, 1957 identical, save for names, contract description and amount, with the letter of the same date from Greene to Thompson which figured in Thompson. For the reasons stated in our opinion in Thompson, plaintiff cannot sustain Miller Act liability of defendants on the basis of this letter.

Judgment affirmed.

Proof of Service

I, IRVING LEVINE, counsel for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of March, 1960, I served three (3) copies of the foregoing petition for a writ of certiorari on the Respondents, Peter Reiss Construction Co., Inc. and The Travelers Indemnity Company, by mailing said copies in a duly addressed envelope, with first-class postage prepaid, to Respondents' attorneys of record as follows: M. Carl Levine, Morgulas & Foreman, Esqs., 521 Fifth Avenue, New York 17, N. Y.

IRVING LEVINE,
Counsel for Petitioner,
501 Fifth Avenue,
New York 17, N. Y.